Supreme Court, U.S.

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OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

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KRISTY LEMKE,

Petitioner,

v.

INTERNATIONAL TOTAL SERVICES, INC., and DAN RICHARDS,

---

On Petition for Writ of Certiorari
To the Third Circuit Court of Appeals

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# PETITION FOR WRIT OF CERTIORARI

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Irving J. Soloway, Esq.
Reimer & Niedweske
14 South Orange Avenue
South Orange, New Jersey 07079
[973] 313-0900

93 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Can the Third Circuit Court of Appeals ignore the United States Supreme Court decision in *Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000)*, which was decided prior to the Third Circuit's decision and then ignore the Supreme Court's decision again on motion for reconsideration?

2. Can the Third Circuit Court of Appeals consciously disregard the holding of the United States Supreme Court which, on its face, seems directed at the exact methodology used by the Third Circuit Court of Appeals to analyze the case herein?

## PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the case.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, Kristy Lemke, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above proceeding on June 15, 2000.

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## CITATIONS OF REPORTS

The opinion of the United States Court of Appeals for the Third Circuit is published at *Lemke v. International Total Services, Inc., et als., 225 F.3d 649, (C.A. 3, 2000).*

The opinion of the United States District Court for the District of New Jersey is published at *Lemke v. International Total Services, Inc., et als., 56 F. Supp. 2d 472 (D.N.J., 1999).*

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## STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction over this case pursuant to *28 U.S.C. § 1331.* This Court also has jurisdiction to hear violations of *Title VII, 42 U.S.C.A. 2000 (e) and 29 U.S.C.A. 206.* This Court also has jurisdiction to hear the state law claims pursuant to the court's supplemental jurisdiction.

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## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

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## STATEMENT OF THE CASE

In a decision filed July 31, 2000, the United States Third Circuit Court of Appeals denied rehearing on an Affirmance on Appeal of the United States District Court's granting of summary judgment based on its believe that "Appellant Kristy Lemke ("Lemke") failed to show a genuine issue of material fact as to whether her former employer's proffered reasons for her discharge were pretextual." To reach this conclusion, the Third Circuit Court of Appeals accepted as true all of the facts set forth by Appellees and made the determination as factfinder that Lemke's counter set of facts are not credible.

The Circuit Court and the District Court both relied upon the employer's proffered reasons for discharge and ignored the evidence presented by the employee. The conclusions upheld by the Third Circuit Court of Appeals are completely outside the bounds of their responsibilities and counter to the guidelines set forth by the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000)* which was decided three days before the Third Circuit Court of Appeals' initial determination. The opinion of the Third Circuit fails to mention *Reeves* and the order with regard to the rehearing also does not mention *Reeves*.

## REASONS FOR GRANTING THE WRIT

Three days before the decision in the present matter was filed by the Third Circuit Court of Appeals, the United States Supreme Court, in *Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000)*, granted certiorari, 528 U.S. 985 (1999), set forth the standard by which a Court of Appeals is to evaluate a claim of employment discrimination. The *Reeves* holding concluded that an employment discrimination plaintiff may survive judgment as a matter of law[1] by submitting two categories of evidence: first, evidence establishing a *prima facie* case and, second, evidence from which a rational factfinder could conclude the employer's proffered explanation for its actions was false. *Id.* concurring Opinion.

The unanimous *Reeves* Court went on to state that "...although the court [Court of Appeals] should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. The clear meaning of this phrase is the exact opposite of the procedure used by the Third Circuit. The Third Circuit held "Appellees satisfied their burden `by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision.'"

The *Reeves* Court further held that the court should give credence to the evidence favoring the non-moving as well as that "`evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.*

It is clear that the Third Circuit chose to ignore the holding in *Reeves* even after the holding was pointed out in the request for rehearing.

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[1] The *Reeves* Court held that "the standard for granting summary judgment `mirrors' the standard for judgment as a matter of law, such that `the inquiry under each is the same.'" Id. at p. 10.

## LEGAL DISCUSSION

### THE ANALYSIS USED BY THE THIRD CIRCUIT AS WELL AS THE TRIAL COURT IS THE EXACT ANALYSIS WHICH THE UNITED STATE SUPREME COURT OVERRULED IN *REEVES*.

The *Lemke* Opinions below fail to even mention the denials of Lemke or the disputed facts set forth by Lemke or the positions taken by the two independent witness affidavits, it is clear that the Third Circuit approached its analysis exactly as did the Court of Appeals did in *Reeves*. It was that very analysis which was reversed by the United States Supreme Court.

The Court of Appeals in *Reeves* was found to have "disregarded critical evidence favorable to petitioner — namely, the evidence supporting petitioner's *prima facie* case and undermining respondent's nondiscriminatory explanation. The court also failed to draw all reasonable inferences in favor of petitioner." *Id.* The Court of Appeals was found to have impermissibly substituted its judgment concerning the weight of the evidence for the jury's. *Id.*

The *Reeves* court further held that "[W]hether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide...But the inference remains--unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above." Id. at p. 14 concurring Opinion.

Lemke has provided the two categories of evidence required to survive summary judgment. She has been able to establish the *prima facie* elements of sex discrimination and she has been able to provide evidence from which a rational factfinder could conclude that Appellees explanations are false. She has provided a credible counter set of facts, affidavits from independent witnesses, two former Appellee International Total Services, Inc. ("ITS") employees, admissions from Appellee Richards, statistics, and deposition testimony which

lend credibility to her claims that Appellees' assertions are pretext. On the other hand, Appellees' complete defense is based upon the unsubstantiated words of the Appellees themselves.

The Third Circuit and the District Courts below set themselves as the finders of fact, which is clearly counter to the mandate set forth by the *Reeves* court. Specifically, the Courts below:

- Did not disregard all evidence favorable to the moving party that the jury is not required to believe;
- Did not give credence to the evidence favoring the non-movant;
- Gave credence to evidence supporting the moving party that is contradicted and impeached and which was obtained exclusively from interested witnesses;
- Disregarded critical evidence favorable to the petitioner;
- Failed to draw all reasonable inferences in favor of the petitioner;
- Did not permit a finder of fact to decide whether Appellees were motivated by discrimination; and
- Accepted as conclusive that discrimination could not have been the Appellees' true motivation, despite the United States Supreme Court holding that a conclusive demonstration is rare, and, therefore, should not readily be taken from the purview of the jury.

Lemke disputed a multitude of Appellees' assertions, yet the Third Circuit and the District Court below each imposed itself as factfinder, and out-of-hand dismissed her contentions. The fact that Third Circuit has made factual determinations is completely counter to the mandate of that court's responsibility and diametrically opposed to the recent edicts of the United States Supreme Court in *Reeves*. This is the role for the jury after all testimony and evidence has been presented. The fact that they did so a mere three days after *Reeves* and failed to even mention the *Reeves* case seems to be contrary to Article III, Section 1 of the United States Constitution.

## CONCLUSION

For the reasons stated above, Petitioner prays for a writ of certiorari, to issue to the United States Court of Appeals for the Third Circuit.

Dated: December 19, 2000

Respectfully submitted,

Irving J. Soloway
Reimer & Niedweske
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 99-5970

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KRISTY LEMKE,
Appellant

v.

INTERNATIONAL TOTAL SERVICES, INC.;
DAN RICHARDS.

---

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 97-cv-05756)
District Judge: Honorable Maryanne Trump Barry

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Before:
BECKER, Chief Judge, ALDISERT, Circuit Judge and
O"KELLY*, District Judge.

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JUDGEMENT

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This cause came on to be considered on the record from the United States District of New Jersey and was submitted on June 14, 2000.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgement of the district court entered September 24, 1999, be and the same is hereby affirmed.

Costs taxed against the Appellant.

Attest:

_____
Acting Clerk

DATED: June 15, 2000

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* Honorable William C. O'Kelly, United States District Judge for the Northern District of Georgia, sitting by designation.

**UNREPORTED - NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 99-5970

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KRISTY LEMKE,
Appellant

v.

INTERNATIONAL TOTAL SERVICES, INC.;
DAN RICHARDS

---

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 97-cv-05756)
District Judge: Honorable Maryanne Trump Barry

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Submitted under Third Circuit LAR 34.1 (a)
June 14, 2000

Before:
BECKER, Chief Judge, ALDISERT, Circuit Judge and
O'KELLY,* District Judge.

(Filed: June 15, 2000)

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MEMORANDUM OPINION OF THE COURT

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* Honorable William C. O'Kelly, United States District Judge for the Northern District of Georgia, sitting by design.

ALDISERT, Circuit Judge.

The district court found that Appellant Kristy Lemke failed to show a genuine issue of material fact as to whether her former employer's proffered reasons for her discharge were pretextual and thus granted summary judgement to Appellees on her gender discrimination claims. We will affirm.

Because the parties are familiar with the facts and the procedures they will not be set forth in depth here. From 1992 to 1997, Appellant was employed by International Total Serviced (ITS), a company which contracts with airlines to provide security and other services to airports nationwide, and during that time she works in various managerial capacities in New Jersey and New York. Although the parties disagree as to whether Appellant quit or was fired because of corporate downsizing, the material facts of this case are not disputed. In early1997 Appellee Dan Richards, who is the ITS Eastern Division President and Appellant's supervisor, eliminated Lemke's district in the New York Metro area during reorganization of the company's regions

and asked her whether she would relocate as a district manager for the Mid-Atlantic region. She refused to relocate and, after participating in several meetings with Richards regarding her future with ITS, left the company in April 1997. In August 1997 she filed a charge of gender discrimination with the United States Equal Employment Opportunity Commission, which issued her a right to sue letter two weeks later. In her complaint in a district court she claimed, inter alia, that ITS's actions constituted gender discrimination in violation of Title VII of the Civil Rights Act of 1964 and the New Jersey Law Against Discrimination[1].

Our review of the district court's grants of summary judgement is plenary. Radich v. Goode, 886 F.2d 1391, 1395 (3d Cir. 1989). Summary judgement may be granted if, after consideration of such items as depositions, affidavits or certification, and after viewing the facts in the light most favorable to the non-moving party, "there is no genuine issue as

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[1] Notwithstanding the district court's extensive discussion of exhaustion of administrative remedies under Title VII. See Lemke v. International Total Services, Inc., 56 F. Supp.2d 472, 477-482 (D.N.J. 1999), we do not reach the issue because the parties did not raise it on appeal.

to any material fact and [] the moving party is entitles to a judgement as a matter of law". Federal Rule of Civil Procedure 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

The Supreme Court has articulated a three-step process for analyzing the shifting burdens applicable in employment discrimination cases:

> First, the plaintiff has the burden of proving by te preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981) (citations and internal quotation marks omitted) (summarizing the teachings of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 802, 804 (1973)).

In the context of gender discrimination, defendants may prevail at the summary judgement stage if they can show

either that: (1) plaintiff has failed to raise a genuine issue of material fact as to any element of her prima facie case, or (2) defendants have presents legitimate nondiscriminatory reasons for the adverse employment action at issue and plaintiff has not raised a genuine issue of material fact as to whether the proffered reasons were merely pretext for gender discrimination. See Spangle v. Valley Forge Sewer Auth., 839 F.2d 171, 173 (3d Cir. 1988) (applying this burden shifting analysis to claims of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq); see also Marzano v. Computer Science Corp., 91 F. 3d 497, 503 n.2 (3d Cir. 1996) (stating that the burden shifting analysis for discrimination claims under Title VII is the same as under ADEA).

The district court assumed Lemke could establish a prima facie case of gender discrimination, but granted ITS and Richards summary judgment because she failed to raise a genuine issue of material fact as to whether the company's's

reason for its actions were merely pretext for discrimination. Appellees satisfied their burden "by introducing evidence which , taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Fuentes v. Perskie, 32 F.3d 759, 763(3d Cir. 1994). The district court found ITS and Richards advanced numerous reasons in support of their decision to reorganize the districts in the Eastern Division of ITS and to relocate Lemke, namely: the performance of the Eastern Division needed improvement; Lemke and another district manager were evaluated as being the weaker district managers in the Eastern Division; the company received numerous complaints from customers and airlines in her territory; she failed to adequately communicate with ITS and its customers; and she failed to increase business in her district. See App. At 62-64. Moreover, Richards maintains that his reorganization plan for the Eastern Division was premised upon his business judgment that geographical alignment of the district would be

more efficient and profitable and that relocation of the district managers was necessary to facilitate a stronger business team. These facts are amply supported by the record and Lemke has failed to raise any genuine issues of material fact which would suggest that Appellees' nondiscriminatory reasons were pretextual.

We hold that the district court did not err granting summary judgment to Appellees.

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We have considered all contentions presents by the parties and conclude that no further discussion is necessary.

The judgement of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/Ruggero J. Aldisert

DATED: June 15, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | |
|---|---|
| KRISTY LEMKE, Plaintiff, | Civ. Action No. 97-5756 |
| v. | **ORDER** |
| INTERNATIONAL TOTAL SERVICES INC. and DAN RICHARDS, Defendants. | |

This matter having come before the court upon the motion of plaintiff Kristy Lemke "Lemke" or "plaintiff", for reconsideration of this court having considered the submissions of the parties without oral argument pursuant to Fed. R. Civ. P. 78; and

It being the opinion of the court that plaintiff does not cite any controlling decisions, factual allegations or legal arguments that were overlooked in this court's Opinion and Order which would alter the result reached;

IT IS on this day of September, 1999,

ORDERED that plaintiff's motion for reconsideration be and hereby is denied.

MARYANNE TRUMP BARRY

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• A motion for reconsideration will be granted where a "dispositive factual matter or controlling decision of law was presents tot he Court but not considered." Damiano v. Sony music Entertainment, Inc., 975 F. Supp. 633, 634 (D.N.J. 1065 (D.N.J. 1987)). Conversely, where the moving party only recapitulates cases and arguments considered by the court to rendering the original decision, the motion will be denied. See Hatge Corp. v. W.R. Grace & Co., 949 F. Supp.987, 990 (D.N.J. 1994). Simply put, mere disagreement with a district court's decision does not warrant the extraordinary remedy of reconsideration. Assisted Living Assoc. of Moorestown, L.L.C. v. Moorestown Tp., 996 F. Supp. 409, 442 (D.N.J. 1998) noting that "(m)ere disagreement...should normally be raised through the appellate process and is inappropriate on a motion for reargument") (citing Bermingham v. Sony Corp. of America, Inc., 820 F. Supp. 834, 859 n.8 (D.N.J. 1992), aff'd mem., 37 F. 3d 1485 (3d Cir. 1994;) ; see also Damiano, 975 F. Supp. At 634 ("Because reconsideration of a judgement after entry is an extraordinary remedy, requests pursuant to these rules are to be granted 'sparingly.'") (quoting NL Industries, Inc. v. Commercial Union Ins. Co., 935 F. Supp. 513, 516 (D.N.J. 1996; (citing Malgonado v Lucca, 636 F. Supp. 621, 630 (D.N.J. 1986))).

Plaintiff asserts that the court "overlooked many significant facts in this case which wee most favorable to the plaintiff." Pl. Br. Supp. At 3. Plaintiff, therefore, asks this court to reconsider its decision to grant summary judgment in favor of defendants International Total Services, Inc. and Dan Richards with respect to her claims of employment discrimination, intentional infliction of emotional distress, and violation of the Equal Pay Act. See id. At 1. The Court will briefly summarize plaintiff's contention, noting at the outset that almost all of

them rely heavily on the Certification of Patricia Painter-a document which this court considered in its Opinion, but disregarded as extraneous. See Opinion at 36 n.13 ("None of the statements in Painter's certification establishes an issue of fact regarding pretext [.]").

First, plaintiff argues that the court erred in concluding that she told her supervisor she had no interest in relocating to another geographic location. See Pl. Br. Supp. At 3-4. Second, plaintiff contends that the court overlooked evidence supporting her argument that defendants' need to relocate her and the complaints about her work performance were a pretext for gender discrimination. See id. At 7-14. Third, with respect to her claim of intentional infliction of emotional distress, plaintiff argues the "(the Court overlooked the most telling example of outrageous behavior when it failed to take note of the disparity between women and men upper level managers.") Id. At 14.

There is no basis for reconsidering the court's prior Opinion and Order. With respect to the claims for employment discrimination, plaintiff has not shown a "dispositive factual matter or controlling decision of Law" tat was overlooked by the court, but instead has relied upon her previous arguments.

Having already addressed those arguments, the court will not do so again here. See Opinion at 36 (concluding "that there is no basis on which a reasonable fact finder could conclude that defendant's actions were fueled by discrimination")> Likewise, with respect to the claim for intentional infliction of emotional distress, the court rejected plaintiff's contention that defendants' actions constitutes extreme and outrageous conduct, and plaintiff has not articulated any reason to conclude otherwise. Id. At 38-39 (finding that "the actions of the defendants do not manifest the degree of extreme and outrageous conduct required"). Plaintiff has, thus, not given this court any grounds on which to grant the motion for reconsideration.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | |
|---|---|
| KRISTY LEMKE, | Civ. Action No. 97-5756 |
| Plaintiff, | |
| | **ORDER** |
| v. | |
| INTERNATIONAL TOTAL SERVICES INC. and DAN RICHARDS, | |
| Defendants. | |

This case having come before the court on defendants motion for summary judgement and plaintiff's cross-motion for summary judgement; and the court having reviewed the submissions of the parties without oral argument pursuant to Fed. R. Civ. P. 78; and consistent with this courts opinion of even date;

It is on this day of July, 1999, hereby

ORDERED that defendants' motion for summary judgement is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgement is denied.

MARYANNE TRUMP BARRY

**FOR PUBLICATION**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | |
|---|---|
| KRISTY LEMKE, Plaintiff, | Civ. Action No. 97-5756 |
| v. | **O P I N I O N** |
| INTERNATIONAL TOTAL SERVICES INC. and DAN RICHARDS, Defendants. | |

**APPEARANCES** Michael J. Reimer, Esq.
Reimer & Niedweske
14 South Orange Avenue
South Orange, NJ 07079
Attorneys for Plaintiff
-AND-
Raymond A. Kresge, Esq.
Diane N. Apa, Esq.
Klett Lieber Rooney & Schorlong
Liberty View at Cherry Hill, Suite 230
Attorneys for Defendants

**BARRY, District Judge**

Defendants International Total Services, Inc.(ITS") and Dan Richards ("Richards") (collectively as "defendants") move for summary judgement. Plaintiff Kristy

Lemke ("Lemke" or "plaintiff") cross-moves for partial summary judgement as to her claims under the New Jersey Law Against Discrimination ("NJLAD") and Tile VII of the Civil Rights Act of 1964. For the following reasons, this court will grant defendants' motion deny plaintiff's motion.

## I. Background

ITS is a company which contracts with airlines to provide security and other services to airports nationwide. On November 18, 1992, plaintiff was hired by ITS as the General Manger at Washington National Airport. See Am. Compl. ¶¶ 1-2; Weitzel V.S. ¶2[1]. In November 1994, she relocated to New Jersey and became a Continental Airlines Terminal Manager for ITS at Newark International Airport. SEE Pl. Dep. At 217, 402-403.

Plaintiff was Terminal Manager until

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[1]The Verified Statement of Robert A. Weitzel is attached as Exhibit B to defendants' Appendix of Exhibits in Support of Motion for Summary judgement.

April 1996 when she became acting District Manager. See id. At 219. In 1996, ITS was organized into three divisions--the Eastern, the Central, and the Western Divisions. See id. at 241. By May 1996, plaintiff was the District Manager of the New York Metro Area, a district within the Eastern Division of ITS. See id. At 219; Am. Compl. ¶ 3. In 1996, there were four districts on the Eastern Division: (1) Newark, which was managed by John Pudlak; (2) New York Metro, which included the airports in New York City, Long Island, Baltimore, Washington, Atlantic City, Allentown (Pa.), Boston, Cape seasonal airports and Burlington (VT.) and was managed by plaintiff; (3) New York State, including Buffalo, Syracuse, Rochester, Albany, Elmira, Ithaca, Binghamton, and Erie (Pa.) managed by Jim Patric; and (4) Southeast, which included Florida, Georgia, the Carolinas and other southeast states managed by Peter Collins.

See Richards V.S. ¶ 2;[2] Reimer Cert. dated Feb. 3, 1999, Exh. D. Thus, even though plaintiff remained in Newark after she was promoted to District Manager, Newark was not within her district and, instead, was managed by Pudlak. See Richards V.S. ¶5.

Toward the end of 1996, Richards became the Eastern Division President and plaintiff reported to him throughout the remainder of her employment with ITS. See Pl. Dep. At 200. In early 1997, Richards decided to realign the geographic districts in the Eastern Division for a number of reasons: one, districts with "purer, straight East-to-West lines would be more efficient;" two, a realignment of the district managers would "make a stronger business team with more potential for growth:" and, three, it lacked a common sense for plaintiff to be a district manager based in Newark when Newark was not

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[2]The Verified Statement of Daniel Richards is attached as Exhibit E to defendants' Appendix of Exhibits in Support of Motion for Summary Judgement.

within her area of responsibility. See Richards V.S. ¶5.

In March 1997, Richards began talking to plaintiff about possible changes in the territory for which she was responsible. See Pl. Dep. At 369. For starters, Richards left plaintiff a voice mail message to the effect of: "I don't know what your personal situation is and would you be interested in possibly relocating." See id. At 370. Richards and plaintiff discussed plaintiff's possible relocation to more of a Mid-Atlantic/Mid-South district on a phone conversation and Richards ultimately provided plaintiff with a colorized map of the geographically reorganized Eastern Division. See id. At 381, 385, 388. The colorized map divided the Eastern Division into four geographic districts: the Northeastern states, including New York, New Jersey; the Mid-Atlantic states, including Pennsylvania; and the Southern states extending to Florida.

See Richards Dep., Exh. 1.[3]

Richards met with plaintiff at the Boston airport on April 9, 1997 to discuss plaintiff's possible relocation to a site in the Mid-Atlantic region. See Pl. Dep. At 391. Plaintiff told Richards that she was not interested in relocating, see id., and memorialized the meeting in a memorandum to Richards dated April 10, 1997. See Reimer Cert. Dates Feb. 3, 1999, Exh. B. In the memorandum, plaintiff expressed her concern that the reorganization would cause her to lose areas, including the New York Metro area, which she had worked hard to establish. See id. Plaintiff also stated that she felt that her territory was being taken away "because (Richards) want(s) to hire a friend and give him the largest area and revenue base to support a large salary." See id.

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[3]The transcript of Richards' deposition (and the colorized map of the districts) is located at Exhibit D to defendants' Appendix of Exhibits in Support of Motion for Summary Judgement.

Plaintiff mentioned gender in the memorandum only insofar as she asserted that she was "well aware of the number of female managers in the company that are at the same level that I am, not many." See id.

Plaintiff and Richards met again in Newark on April 18, 1997. See Pl. Dep. at 419. The parties characterize the meeting somewhat differently, i.e. plaintiff asserts that she was fired and defendants assert that she quit, both sides agree that during the meeting, Richards reiterated that plaintiff's district was being eliminated or "downsized." Richards V.S. ¶ 9; Lemke Aff. ¶ 9; Reimer Aff. Dated Feb. 3, 1999, ¶14; Pl. Dep. at 4260-27. Plaintiff responded by calling Richards "a piece of work." Lemke Aff. ¶9 Richards V.S. ¶ 9. Plaintiff left Richards' office but shortly thereafter returned and asked questions about severance pay and money for accrued vacation. See Lemke Aff. ¶ 9; Richards Aff. ¶9; Pl. Dep. at 422-24. After

Plaintiff mentioned gender in the memorandum only insofar as she asserted that she was "well aware of the number of female managers in the company that are at the same level that I am, not many." See id.

Plaintiff and Richards met again in Newark on April 18, 1997. See Pl. Dep. at 419. The parties characterize the meeting somewhat differently, i.e. plaintiff asserts that she was fired and defendants assert that she quit, both sides agree that during the meeting, Richards reiterated that plaintiff's district was being eliminated or "downsized." Richards V.S. ¶ 9; Lemke Aff. ¶ 9; Reimer Aff. Dated Feb. 3, 1999, ¶14; Pl. Dep. at 4260-27. Plaintiff responded by calling Richards "a piece of work." Lemke Aff. ¶9 Richards V.S. ¶ 9. Plaintiff left Richards' office but shortly thereafter returned and asked questions about severance pay and money for accrued vacation. See Lemke Aff. ¶ 9; Richards Aff. ¶9; Pl. Dep. at 422-24. After

Richards stated that he would have to look into her questions, see Pl. Dep. at 429, plaintiff collected her personal belongings, wished the employees in the building well, and left the building, never to return. See id. At 430. The ITS Hourly Transaction Form, dated April 18, 1997 and signed by Richards, states that plaintiff's last day of employment was April 18, 1997 and the box labeled "Termination" sets forth "Organizational Downsizing" as the reason. Lemke Aff., Exh. E.

Because Richards needed to immediately submit a budget plan for the Eastern Division and because plaintiff has rejected the Mid-Atlantic region, Richards expanded Pudlak's New Jersey territory to include the Mid-Atlantic states. See Richards V.S. ¶11. Thus, when plaintiff left ITS, there were three district managers: Pudlak, covering New Jersey and the Mid-Atlantic region; Collins, covering the Southern region; and Brian

Michel who was hired to cover the Northeastern region, including New York and Boston. See Pl. Dep., Exh. D-25. Not long afterwards, Michel resigned and Bruce Watson took over the Northeastern region. On October 2, 1997, plaintiff began working as a full-time second grade teacher at St. Francis School. See Pl. Dep. At 99-101.

On August 8, 1997, plaintiff filed a charge of gender discrimination against ITS with the United States Equal Employment Opportunity Commission ("EEOC"). See Pl. Dep. At 110-11. On August 22, 1997, plaintiff requested a notice of right to sue from the EEOC and it was issued on August 28, 1997. See id. At 118-20 and Exhs. D-11, D-12. Plaintiff simultaneously filed a charge of gender discrimination with the New Jersey Division of Civil Rights ("NJDCR"). See Pl. Dep. At 117. Plaintiff never withdrew the charge filled with the NJDCR and the NJDCR has yet to issue a determination of her

charge of discrimination. See id. at 117-18.

On November 24, 1997, plaintiff filed with this court a four-count compliant against ITS and Richards alleging gender discrimination in violation of NJLAD (Count One), gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") (Count Two), and intentional infliction of emotional distress (Counts Three and Four). On January 4, 1999, plaintiff amended her complaint and added Count Five, alleging that defendants violated the Federal Equal Pay Act ("EPA"). Cross-motions for summary judgement followed.[4]

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[4]Parenthetically, the motions for summary judgement were technically deficient. First, neither side submitted a statement of disputed or undisputed material facts as required by Local Civil Rule 56.1. See Local Civ. R. 56.1 (stating that upon the filing of a motion for summary judgement, "each side shall furnish a statement which sets forth material facts as to which there exists or does not exist a genuine issue") (emphasis added). Second, Local Civil Rule 7.2(b) states that each brief "shall include a table of contents and a table of authorities and shall not exceed 40 ordinary typed or printed pages...excluding pages required for the table of contents and authorities." Local Civ. R. 7.2(b). Plaintiff's brief does not contain a table of contents or authorities, and defendants have submitted, without receiving permission of this court, an overlength moving brief of 45 pages. See Local Civ. R. 7.2 (b) providing that

## II. DISCUSSION

Summary judgment may be granted if, after consideration of such items as depositions, affidavits or certifications, and after viewing the facts in the light most favorable to the non-moving party, "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrert, 477 U.S. 317, 322–23 (1986); Davis v. Portline Transportes Maritime Internacional, 16 F.3d 532, 536 n.3 (3d Cir. 1994). With this standard in mind, this court will evaluate each of plaintiff's claims.

### A. Gender Discrimination Claims

In Counts One and Two of the complaint, plaintiff alleges that defendants violated Title VII and NJLAD, respectively, by

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"[b]riefs of greater length will only be acceptable if special permission of the Judge or Magistrate Judge is obtained prior to submission of the brief"). The parties are advised to consult the civil practice rules in future cases.

discriminating against her on the basis of her gender. Defendants move for summary judgment because: (1) plaintiff has failed to exhaust the administrative remedies required to bring a Title VII claim; (2) plaintiff's NJLAD claim is barred because she has a charge pending with the NJDCR; (3) plaintiff has failed to set forth a prima facie case of gender discrimination under Title VII and NJLAD as she has not shown that she suffered an adverse employment action; and (4) even assuming a prima facie case under Title VII and NJLAD, plaintiff has not demonstrated that defendants' reasons for their actions were pretextual. Plaintiff not only opposes defendants' motion for summary judgment but asserts that this is the "very rare" case in which summary judgment should be granted to a plaintiff on her Title VII and NJLAD claims. See Pl. Br. at 11.

**1. Exhaustion under Tile VII**

Although plaintiff offers no response to defendants' exhaustion argument, this court will first address whether plaintiff has sufficiently exhausted her administrative remedies such that her Title VII claim is properly before this court. Neither side disputes that plaintiff must file a charge of discrimination with the EEOC and receive a notice of right to sue before she can bring an action in federal court alleging a Title VII violation. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (noting that prerequisites to filing Title VII civil action are the timely filing of charges of discrimination with the EEOC as well as receiving the EEOC's statutory notice of the right to sue) . Plaintiff did, in fact, file a charge with the EEOC on August 8, 1997. The question here is whether plaintiff's notice of right to sue, requested only fourteen days after the charge was filed and issued only

six days later, was premature given that it bypassed the 180-day administrative investigation and conciliation process mandated by Title VII.

Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1)(1994), is the statutory provision governing right to sue notices issued to aggrieved parties and, thus, guides this court's analysis. It provides that the EEOC shall issue a notice of right to sue to an aggrieved party if the charge of discrimination filed with the EEOC is dismissed or 180 days have elapsed without the EEOC filing a civil action or entering into a conciliation agreement. See 42 U.S.C. § 2000e-5(f)(1)(1994). Once notified, the aggrieved party has ninety days within which to initiate a civil action against the respondent named in the charge. See id.

The EEOC has been given the power to issue procedural regulations in order to "carry out the provisions of [Title VII]." 42

U.S.C. § 2000e-12(a). One such regulation provides that a notice of right to sue may be issued before the 180-day period has expired (an "early" right to sue notice). See 29 C. F.R. § 1601.28(a)(2)(1998). Section 1601.28(a)(2) allows the EEOC to issue an early notice of right to sue "any time prior to the expiration of 180 days from the date of filing the charge" provided that an Area Director or other enumerated director certifies that "it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge . . . . "[5] 29 C.F.R. § 1601.28(a)(2)(1998).

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[5] The regulation reads as follows:

When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued, and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission may issue such notice . . . at any time prior to the expiration of 180 days from the date of filing the charge with the Commission; provided, that the District Director, the Area Director, the Local Director, the Program Director, Office of Program operations or upon delegation, the Director of Systematic Programs, Office of Programs operations or the Directors, Field Management Programs, Office of Programs Operations has determined that it is probable that the Commission will be unable to complete

The EEOC's rationale that regulation was "the legal principle that a party is not required to perform a useless act, i.e., wait for the passage of 180 days when the passage of such time will not accomplish any purpose." Pearce v. Barry Sable Diamonds, 912 F. Supp. 149, 154 (E.D. Pa. 1996) (citing to 42 Fed. Reg. 47, 828, 47, 831 (1997)).

Here, plaintiff filed her charge of discrimination with the EEOC on August 8, 1997 and requested a right to sue letter on August 22, 1997 because she wanted to "file a lawsuit in this matter as quickly as possible." Pl. Dep., Exh. D-11. Pursuant to 29 C.F.R. § 1601.28(a)(1), the Area Director, on behalf of the EEOC, issued a notice of right to sue on August 28, 1997--only 20 days after the charge was filed--stating that "[l]ess than 180 days have passed since the filing of this charge, but I have determined

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its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certification to that effect.

that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing the charge." Id. at D-12. The EEOC immediately terminated its processing of the charge, see id, and plaintiff filed suit in this court on November 24, 1997.

Since September 1977, when 29 C.F.R. § 1601.28(a)(2) was issued, the validity of the regulation has been called into question and has been hotly debated in the courts. See, e.g., Valerie J. Pacer, Case Comment, The Early Right-To-Sue Letter: Has the EEOC Exceeded its Authority? Henschke V. New York Hospital-Cornell Medical Center, 821 F. Supp. 166 (S.D.N.Y. 1993), 72 Wash.U.L.Q. 757, 766 (1994) (noting the twenty-year split among the courts regarding the early right to sue letter). Some courts have held that 29 C.F.R. § 1601.28(a)(2) contravenes the procedural requirements of Title VII and Congress's intention that 180 days is an appropriate

length of time to allow for conciliation of employment disputes while preserving a claimant's right to speedy relief. See, e.g., Montova v. Valencia County, 872 F. Supp. 904 (D.N.M. 1994); Henschke v. New York Hospital Cornell Med. Ctr., 821 F. Supp. 166, 169–71 (S.D.N.Y. 1993); People of State of NY by Abrams v. Holiday Inns, Inc., 656 F. Supp. 675, 678–80 (W.D.N.Y. 1984); Mills v. Jefferson Bank E., 559 F. Supp. 34, 34–36 (D. Colo. 1983); Banco Real Spencer v. S.A., 87 F.R.D. 739 (S.D.N.Y. 1980); Grimes v. Pitney Bowes, Inc., 480 F. Supp. 1381, 1383–85 (N.D. Ga. 1979). Other courts, including the only two Circuits to have directly decided this issue[6], have concluded that the regulation is reasonable, and thus entitled to deference, because it makes

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[6] After acknowledging the split within the courts, the Court of Appeals for the Tenth Circuit failed to reach the issue of the validity of 29 C.F.R. § 1601.28(a) (2), deeming the issue waived due to the defendant's failure to raise it as an affirmative defense. See Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1228 (10th Cir. 1977)

little sense that a claimant must sit idly by for 180 days when the EEOC has certified that it is unable to investigate the charge within the prescribed time. See, e.g., Sims v. Trus Joist MacMillan, 22 F.3d 1059 (11th Cir. 1994); Brown v. Puget Sound Elec., 732 F.2d 726, 729 (9th Cir. 1984), cert. denied, 469 U.S. 1108(1985); Saulsbury v. Wismer & Becker, Inc., 644 F.2d 1251, 1256-57 (9th Cir. 1980); Bryant v. California Brewers Ass'n, 585 F.2d 421, 425 (9th Cir. 1978), vacated and remanded on other grounds, 444 U.S. 598 (1980); Martinez v. Labelmaster, 1996 WL 580893 (N.D. Ill. Oct. 4, 1996); Chandler v. Fast Lane, Inc., 868 F. Supp. 1138, 1141-42 (E.D. Ark. 1994); Rolark v. University of Chicago Hospitals, 688 F. Supp. 401 (N.D. Ill. 1988); Cattell v. Bob Frensley Ford, Inc., 505 F. Supp. 617, 619-22 (M.D. Tenn. 1980).

Perusal of the case law within this Circuit provides little guidance. Although in

dicta expressing disapproval of the regulation and attempts by claimants to "deliberate[ly] bypass" administrative remedies, the Court of Appeals for the Third Circuit declined to reach the issue of the validity of 29 C.F.R. § 1601.28(a)(2) and the effect of early right to sue notices in Moteles v. University of Pa., 730 F.2d 913, 916–18 (3d Cir.), cert. denied, 469 U.S. 855 (1984). Moreover, district courts within this Circuit have reached different conclusions. Compare DeFranks v. Court of Common Pleas of Fayette Counts, 1995 WL 606800 (W.D. Pa. Aug. 17, 1995)(rejecting contention that 29 C.F.R. § 1601.28(a)(2) was invalid); Anjelino V. New York Times Co., 1993 WL 170209 at *8 n.8 (D.N.J. May 14, 1993) (refusing to find that Moteles required dismissal even if the plaintiffs deliberately bypassed the EEOC administrative process and obtained right to sue letters pursuant to 29 C.F.R. § 1601.28 (a)(2)); Hooks v. RCA Corp., 620 F. Supp. 1,

1-2 (E.D. Pa.1984) (finding that right to sue letter was properly issued by EEOC pursuant to 29 C.F.R. § 1601.28(a)(2)); Bev v. Schneider Sheet Metal, Inc., 596 F. Supp. 319, 323 (W.D. Pa. 1984) (holding that EEOC's issuance of right to sue letter at plaintiff's request, twenty-seven days after receipt of the charge, did not deprive court of subject matter jurisdiction); with Robinson v. Red Rose Communications, Inc., 1998 WL 221028 (E.D. Pa. May 5, 1998) (holding that, despite 29 C.F.R. § 1601.28 (a) (1), plaintiff must wait 180 days to satisfy the exhaustion of remedies requirement); Krause v. Security Search & Abstract Co. of Phila. Inc., 1997 WL 528081 (E.D. Pa. Aug. 21, 1997) (same); Pearce v Barry Sable Diamonds, 912 F. Supp. 149, 151 (E.D. Pa. 1996)(noting its inclination to find the regulation invalid) Finally, in 1996, recognizing the "cacophony" within the courts, a district court in the Eastern

District of Pennsylvania certified questions concerning the validity of 29 C. F.R. § 1601.28 (a) (2) to the Court of Appeals for the Third Circuit but it appears that no answers were furnished. See Pearce, 912 F. Supp. at 151.

It is within this morass that this court must address defendants' contention that summary judgment is warranted on plaintiff's Title VII claim because plaintiff's right to sue letter was premature and, thus, that she has failed to properly exhaust her administrative remedies.

This court is inclined to agree with the disapproving tenor of the Court of Appeals for the Third Circuit in Moteles and the various district courts which have held that the EEOC exceeded its authority in issuing a regulation which allows for early right to sue letters. While this court must defer to the EEOC's interpretation of Title VII in its regulations if "reasonable", EEOC

v. Commercial Office Products, Co., 486 U.S. 107,15 (1988), the EEOC cannot adopt regulations that are inconsistent with Congress's statutory mandate. See Mohasco Corp. v. Silver, 447 U.S. 807 (1980).

The regulation providing for early right to sue letters, especially as applied in this case, contravenes both the statutory language and the purpose of Title VII. Section 706(f) (1) of Title VII provides in relevant part that:

> If a charge filed with the Commission ... is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or . . . entered into a conciliation agreement . . ., the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge..

42 U.S.C. § 2000e-5(f)(1)(1994) . The language of Section 706(f)(1) is crystal clear and provides that the EEOC shall issue a right to sue letter only (1) "[i]f a charge

filed with the Commission . . . is dismissed by the Commission . ." ." or (2) "if within 180 days from the filing of such charge . . . the Commission has not filed a civil action under this section....." 42 U.S.C. § 2000e-5(f) (1). As another court has noted, to accept the position that Section 706(f) (1) does not prohibit the issuance of a notice of right to sue before 180 days would be to "ignore the conditional 'if . . .' phrasing of the statute." Spencer, 87 F.R.D. at 743 (Quoting Budreck V. Crocker Nat'l Bank, 407 F. Supp. 635, 639 (N.D. Cal. 1976)). Moreover, this reading gives teeth to the intent of Congress seen in the analysis of Section 706(f)(1) in the Conference Report presented to the Senate:

> With respect to cases arising under this subsection, if the Commission: (a) has dismissed the charge, or (b) 180 days have lapsed from the filing of the charge without the Commission . . . having filed a complaint under section 706(f), or without the Commission having entered into a conciliation agreement to which the person aggrieved

> is a party . . . the person aggrieved may bring an action in an appropriate district court within 90 days after receiving notification.

118 Cong. Rec. 7166, 7168 (1972). This court agrees with the court in Spencer that "[t]his analysis makes clear that occurrence of one of these two events is a necessary - not merely a sufficient -- condition for commencement of private civil actions." Spencer, 87 F.R.D. at 743.

Yet another provision of Title VII requires the EEOC to investigate the allegations and to either dismiss or attempt to conciliate the complaint. See 42 U.S.C. § 2000e-5(b) (1994) (providing, in part, that whenever a charge is filed the EEOC "shall make an investigation thereof" and "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion") (emphasis added) . The administrative procedures of Title VII were

enacted by Congress based on its assumption that "(a)dministrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases." H.R.Rep. No. 238, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S.C.C.A.N. 2137, 2146; see also Ostapowic: v. Johnson Bonze Co., 541 F.2d, 394, 398 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (noting that"[c]onciliation rather than formal court proceedings remains the preferred method of settling [discrimination] disputes"). Plaintiff's request for a right to sue letter only fourteen days after her charge was filed -- and the EEOC's facilitation of this bypass of the administrative process by issuing the letter only six days later -- flies in the face of both the plain language of Title VII and Congress's intent that discrimination charges be administratively investigated and at least initially addressed by conciliation attempts rather than civil actions.

Moreover, this court is unmoved by the reasoning of some courts, and the EEOC in issuing the regulation, that with the huge backlog of cases, it would be a "travesty" to make claimants wait 180 days before filing a civil action if the EEOC unilaterally decides that it is unlikely that it will complete the administrative processing within 180 days. Bryant, 585 F.2d at 425. Any conciliation efforts -- even if abbreviated -- could help in the resolution of some employment disputes. More importantly, however, Congress was aware of the EEOC's backlog of cases and possible administrative delay when it established "a ceiling of time -- 180 days -- beyond which a complainant would not have to wait before filing a claim in district court." Sims, 22 F.3d at 1063 (citing legislative history of 180-day time period). The 180-day window was "a proper balance between the administrative process and administrative delay." Pearce, 912 F. Supp.

at 154. If making claimants wait 180 days "is a 'travesty,' it is one that Congress intended, for it sought to compel attempts to determine or settle Title VII disputes at the agency level before resort to the federal courts." Spencer, 87 F.R.D. at 745 (citing to Alexander V. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).

That having been said, however, the Court of Appeals for the Third Circuit has intimated, and numerous courts have opined, that the Supreme Court's decision in Zipes V. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) establishes that the 180-day exhaustion period is not jurisdictional (see, e.g., Moteles, 730 F.2d at 917; Sims, 22 F.3d at 1061; Pearce, 912 F. Supp. at 153) and, therefore, is subject to equitable considerations. Cf. Zipes, 455 U.S. at 393. While both the short time frame and plaintiff's representation in her letter to the EEOC that she was seeking an early right

to sue letter solely because she wished to "file a lawsuit in this matter as quickly as possible" more than suggest that she was deliberately bypassing the administrative procedures of Title VII, plaintiff was doing what the regulation allowed her to do. Accordingly, it would not be equitable to dismiss plaintiff's Title VII claim, particularly where the regulation she followed has not been found to be invalid in this Circuit. Cf. DeMatteis v. Eastman Kodak Co., 520 F.2d 409, 411 (2d Cir. 1975) (stating that "[I)t would be inequitable under such circumstances, and would frustrate the remedial purpose of the Civil Rights Act, to apply the decision of this court so as to bar the claim of a party who filed suit within the period recommended by the administrative body which had been established to help vindicate such statutory rights"). Moreover, given that this case has been pending in this court for over a year

and a half and is essentially ready for trial, and given this court's determination regarding the merits of plaintiff's Title VII claim, see infra, staying this action while plaintiff returns to the EEOC for administrative investigation and conciliation efforts during the requisite 180-day window would serve no useful purpose.

**2. Statutory Election of Remedies under NJLAD**

Moving to the administrative scheme surrounding plaintiff's NJLAD claim--a scheme which plaintiff also fails to address in her brief[7]--defendants argue that plaintiff's NJLAD claim fails as a matter of law because she admittedly never withdrew the administrative complaint she filed with the NJDCR and the complaint was still pending

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[7] Plaintiff has not only failed to address numerous issues raised by defendants, but she has submitted a single brief which apparently is meant to serve as her moving brief for summary judgment, her opposition brief to defendants' motion for summary judgment, and her reply brief to defendants' opposition.

when she filed this lawsuit. Accordingly, defendants argue, plaintiff's NJLAD claim is barred because N.J.S.A. § 10:5-27 provides that the administrative process with the NJDCR shall be exclusive while pending.

The administrative requirements for a NJLAD claim differ greatly from the procedural requirements under Title VII -- most notably, exhaustion of administrative remedies is not required. Indeed, N.J.S.A. § 10:5-13 provides that an aggrieved party may either file a discrimination claim with the NJDCR or initiate a formal civil action. See N.J.S.A. § 10:5-13 (1993). Those alternate remedies, however, are mutually exclusive and N.J.S.A. § 10:5-27 provides that: "the [administrative] procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned." N.J.S.A. § 10:5-27 (1993). This does not

mean, however, that plaintiff's NJLAD claim is barred.

Plaintiff filed a charge of discrimination with the NJDCR on August 8, 1997. See Pl. Dep. at 117. As defendants point out, plaintiff admitted during her deposition that she never withdrew the complaint and that the NJDCR did not issue a determination or a decision on her charge of discrimination. Sec id. at 117-1.8. What defendants fail to acknowledge, however, is that during her deposition, plaintiff also testified -- and defendants do not dispute -- that she received a letter from "the State" within sixty days of the November 23, 1998 deposition, saying that the New Jersey Division on Civil Rights had closed her case. Id. Defendants gloss over this portion of the deposition arguing, rather, that plaintiff's NJLAD claim is barred because her administrative complaint "was still pending before the NJDCR as of the time that she

filed her lawsuit in this case." Def. Br. at 34 (emphasis added).

Although defendants' argument may have been plausible at one time, see Aldrich v. Manpower Temp. Services, 277 N.J. Super. 500, 505 (App. Div.1994) (holding that N.J.S.A. § 10:5-27 does not jurisdictionally prevent plaintiff from filing a civil action "after withdrawing the administrative complaint before final disposition") (emphasis added)), certif. denied, 139 N.J. 442 (1995), it is undeniably foreclosed by the recent opinion of the Supreme Court of New Jersey in Wilson v. Wal-mart Stores, 158 N.J. 263 (1999) . In Wilson, the Court rejected what it deemed to be the "arbitrary result[]" that a plaintiff who withdrew his or her NJDCR complaint before filing a civil action in Superior Court could proceed, while a plaintiff who withdrew his or her NJDCR complaint after the civil action was filed could not. Id. a: 270-71. The Court held that the exclusivity

provision of NJLAD, namely N.J.S.A. § 10:5-27, did not bar a NJLAD action brought in state court even though the plaintiff failed to withdraw her NJDCR complaint until after the complaint was filed on Superior Court. Id. at 271. The Court reasoned that because the NJDCR was not actively investigating the case, the parties were not involved in discovery, and the NJDCR had not rendered an administrative ruling, the purpose of the exclusivity provision was not thwarted by allowing the plaintiff to proceed with her civil action even though her NJDCR complaint was withdrawn after the action was filed. Id.

Likewise, here, there is no evidence that extensive, or even any, discovery or investigation took place at the NJDCR, the NJDCR has "closed" plaintiff's case, and it is undisputed that no final determination was ever reached. Thus, plaintiff is not running afoul of the exclusivity provision of N.J.S.A. § 10:5-27 and her NJLAD claim is

properly before this court.

**3.Merits of Plaintiff's Title VII and NJLAD Claims**

Defendants also argue that, even if properly before this court, plaintiff's Title VII and NJLAD claims must fail on the merits. Both sides acknowledge that this case involves discrimination claims based upon circumstantial, rather than direct, evidence and, therefore, that the burden shifting approach set forth in McDonnell Douglas applies[8]. The Supreme Court in McDonnell Douglas enunciated the three-step process by which to analyze the shifting burdens applicable to such employment discrimination cases:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of

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[8] Neither side asserts that plaintiff's NJLAD claim is subject to a different analysis than her Title VII claim and, therefore, this court will not differentiate between the claims. See Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 595 (1988)(adopting McDonnell Douglas burden shifting analysis for NJLAD claims) .

> discrimination. Second, if the Plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53(1981)(summarizing test enunciated in McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973)) (citations omitted)Within this context, defendants may prevail on their summary judgment motion if they can show either that: (1) plaintiff has raised no genuine issue of material fact as to one or more of the elements of a prima facie case of employment discrimination; or (2) defendants have presented legitimate non-discriminatory reasons for the adverse employment action to which plaintiff points and plaintiff has not raised a genuine issue

of material fact as to whether the reasons proffered are a mere pretext for gender discrimination. See Cherchi v. Mobil Oil Corp., 693 F. Supp. 156, 161 (D.N.J. 1988)[9]. Defendants argue that they have shown both (1)and (2).

This court need not decide whether plaintiff has set forth a prime facie case of discrimination based upon her gender. Rather, assuming that plaintiff has done so and, thus, has shown that she is a member of a protected class, that she was qualified for her position with ITS, that she suffered an adverse employment action as a result of defendants' actions, and that defendants either retained, or replaced plaintiff with, someone from outside the protected class, See

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[9] Cherchi, and other cases that may be cited in this opinion, do not involve discrimination under Title VII or NJLAD but age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The burden shifting analysis, however, is the same. See Marzano V. Computer Science Corp. Inc., 91 F.3d 4.97, 503 n.2 (3d Cir. 1996); Armbruster v.Unisys Corp., 32 F.3d 768, 777 n.10 (3d Cir. 1994)

Marzano, 91 F.3d at 503; Sempier V. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir.), cert. denied, 515 U.S. 1159 (1995), plaintiff's Title VII and NJLAD claims must fail because she has failed to show that there is a genuine issue of material fact as to whether defendants'proffered legitimate reasons for its actions are pretextual. In other words, although the parties dispute whether plaintiff was terminated or simply quit when ITS was reorganized, no party disputes that, upon reorganization, defendants eliminated plaintiff's district in the New York Metro area and asked whether she would relocate as a district manager for the Mid-Atlantic region. Plaintiff declined this transfer and subsequently left ITS. Whether this court construes defendants' actions vis-a-vis plaintiff as a straight termination, a reduction in force, a constructive discharge, or simply a transfer which qualifies as an adverse employment action, defendants have

presented non-discriminatory legitimate reasons for their actions which plaintiff has not adequately refuted.

Moving straight to defendants' second argument, under McDonnell Douglas and its progeny, once a prima facie case is established, defendants must come forth with legitimate non-discriminatory reasons for their actions. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). "The employer satisfies its burden of production by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Id.

Defendants have more than met this "relatively light" burden. Id. Indeed, defendants have advanced numerous reasons in support of their decision to reorganize the districts in the Eastern Division of ITS and to relocate plaintiff. First, defendants have provided a verified statement from the

President of ITS, Robert Weitzel, which states that he made clear to Richards in 1996 that the performance of the Eastern Division needed improvement. See Weitzel V.S. ¶ 9; Richards V.S. ¶ 5. Weitzel told Richards that he viewed plaintiff and another district manager, Patric, to be the weaker district managers in the Eastern Division. Id. With respect to plaintiff, numerous complaints and problems had been raised by customers in her territory. Id. In the first quarter of 1997, Richards presented Weitzel with a reorganization plan that included geographically realigning the districts in the Eastern Division. Id. ¶ 10. The plan included relocating plaintiff to the Mid-Atlantic region as district manager and demoting Patric to district trainer. Id.

Richards' testimony is similar. During the time plaintiff was a district manager for the New York Metro area, Richards was aware of a number of customer complaints regarding

her performance. See Richards V.S. ¶ 4. Among other complaints, US Air in Burlington (Vermont), US Air in Boston, United Express in Boston, and American Airlines in Stewart, all expressed dissatisfaction and lodged complaints during plaintiff's tenure as a district manager. Id. In addition, plaintiff failed to adequately communicate with both ITS and ITS's customers. She also failed to inform Richards of problems that arose at her sites, one being when an ITS security guard at JFK Airport in New York City hit a passenger who was holding a baby. Id. In addition, plaintiff's failure to communicate with customers-neglecting, for example, to inform US Air in Burlington in advance of ITS's billing rate increases -- led to customer dissatisfaction. Id.[10] Finally,

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[10]In her certification, plaintiff states that these rate increases were communicated by the ITS controller to US Air headquarters. See Lemke Cert. ¶ 5B. Assuming this to be true, it does not call into question Richards' statement that plaintiff failed to facilitate customer relations by alerting the local US Air officials within her district of the imminent increases.

plaintiff failed to increase business within her district while she was a district manager reporting to Richards. Id.

Richards maintains that his reorganization plan for the Eastern Division was premised upon his business judgment that geographic alignment of the districts would be more efficient and profitable and realignment of the district managers was necessary to facilitate a stronger business team. Id. ¶ 5. He concluded that not only did it make little sense for plaintiff to be located in Newark when she had no responsibility for that territory, but that the Eastern Division would be better served by relocating plaintiff to the Mid-Atlantic region as there had been significant customer dissatisfaction at sites in her district during her tenure. Id. ¶¶5,8.

The statements of Weitzel and Richards are amply supported by a number of customer surveys which reflect dissatisfaction with

plaintiff by customers within her district. For example, on March 21, 1997, US Air at the Burlington International Airport in Vermont gave plaintiff the second to lowest rating regarding management support. See Reimer Cert. dated Feb. 3, 1999, Exh. H-1. In addition, on June 12, 1997, US Air in Burlington gave plaintiff the lowest possible rating, noting that "[plaintiff] has since left the company so time will tell as to the new management." Podbielski V.S.[11], Exh. 1. These evaluations resulted in Patricia Podbielski, a Customer Services Manager of ITS, calling US Air in Burlington to discuss the comments and ITS's commitment to customer service. See Podbielski VS. ¶¶1 1,4. Finally, US Air at MacArthur Airport on Long Island evaluated plaintiff as only adequately responding to customer inquiries. Id., Exh. 3.

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[11] The Verified Statement of Patricia Podbielski is attached as Exhibit F to defendants' Appendix of Exhibits in Support of Motion for Summary Judgment.

Once defendants have proffered legitimate non-discriminatory reasons for their actions, as they have here, "plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes, 32 F.3d at 764. The Court of Appeals for the Third Circuit has articulated the quantum of proof required to make this showing, rejecting both the position that plaintiff may avoid summary judgment by simply arguing that the factfinder need not believe the defendants' proffered reasons as well as any requirement plaintiff must adduce evidence directly contradicting the defendants' reasons. See Fuentes, 32 F.3d at 764. Instead, Plaintiff's evidence "must allow a factfinder reasonably

to infer that each of the employer's proffered non-discriminatory reasons...was either a post *hoc* fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext)." Id. (citations omitted).

Stated somewhat differently, in the summary judgment context, "the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'" Id. at 765 (citations omitted and brackets in original) . This requires more than simply criticizing the defendants' assertions in a fashion similar to the "schoolground retort, 'Not so[.]'" Id. at 765. Recognizing that this standard places a

high burden on plaintiffs, the Third Circuit acknowledged that it "arises from an inherent tension between the goal of all discrimination law and our society's commitment to free decision making by the private sector on economic affairs." Id. (quoting Ezold v. Wolf, Blovk, Schorrand, Soils-Cohen, 983 F.2d 509, 531 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993))

Plaintiff has not met her burden of showing that a reasonable factfinder could find that defendants' proffered reasons for their actions were merely pretextual and that gender discrimination was the true reason. To reiterate and summarize, defendants essentially set forth three reasons for their actions: first, the performance of the Eastern Division of ITS had worsened and it was thought that reorganizing the districts along geographic lines would increase efficiency and profitability, see Def. Br. at 29; Weitzel V.S. ¶ 9; second, defendants

believed that it defied sound business judgment for plaintiff to be based in a location (Newark) that was not within her territory of responsibility and that it made more sense that she be located in a major site within her district, as all of the other district managers were, see Def. Br. at 29; and, finally, defendants were concerned about complaints and problems stemming from sites within plaintiff's district and, because of those concerns, it was decided that she should not assume the duties of district manager of the new Northeastern region. Id.

Plaintiff has presented absolutely nothing to refute the first two reasons set forth by defendants. Indeed, she does not even take issue with defendants' assertions that the Eastern Division was in need of improvement, that redistricting was an attempt to increase efficiency and

profitability[12], and that all other district managers were based within their districts while she was not. Parenthetically, plaintiff notes in passing that she did not elect to be based in Newark and that "[I)t is [,therefore,] difficult to imagine how ITS can blame me for their decision to place my office in Newark." Lemke Cert. ¶ 6. Plaintiff missess the point. Who was responsible for placing plaintiff in Newark and why does not detract whatsoever from defendants' assertion that it made more business sense to have their district managers based at sites within their districts.

Plaintiff, while not disputing much less refuting defendants' reasons for their

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[12] Plaintiff states that "[t]he alleged 'geographical' reorganization is without any foundation, since ITS [sic) subsequent reorganization involved a district that was both north and south of Newark and for which Newark was the central point." Lemke Cert. ¶ 6. Without any further explanation given, this court is uncertain what plaintiff is trying to say and finds that this statement alone does not create a genuine issue of material fact such that a trier of fact could find that defendants' purported reasons for redistricting were a mere pretext for discrimination.

actions, argues, however, that, one, defendants do not adequately support their position that plaintiff was terminated because of a reduction in force; two, contrary to defendants' contention, plaintiff was in fact terminated; and, three, statements about deficiencies in plaintiff's performance are a recent fabrication and must be rejected. See. Pl. Br. at 12-13; Reimer Cert. dated Feb. 3, 1999 ¶¶ 9–19. These arguments nave no merit.

First, defendants have not argued that plaintiff was terminated in accordance with a business judgment to reduce its work force due to economic necessity. Indeed, contrary to a reduction in force scenario, both sides agree that defendants offered plaintiff a transfer to another region along with the retention of her job title, salary and benefits. See Pl. Dep. at 427–28. There is absolutely no mention of a company-wide reduction in force policy as justification

for defendants' actions toward plaintiff.

This court also rejects plaintiff's argument that, contrary to defendants' contention, plaintiff did not quit but was terminated. As stated previously, this court need not, and indeed cannot, tread into the disputed arena of whether plaintiff was terminated or simply quit when she was offered a transfer and told that her present position would no longer be available. This court has simply assumed that plaintiff suffered an adverse employment action at the hands of defendants, be it a transfer or a termination, a fact which, while pertinent to the prima facie step of the analysis, is irrelevant for purposes of whether plaintiff has amply refuted defendants' reasons for their actions.

Finally, and more on point, plaintiff takes issue with defendants' evidence that she was not an effective district manager. Plaintiff first attempts to refute Weitzel's

testimony regarding deficiencies in her performance while the General Manager at Washington D.C. airport and while she served as a terminal manager at the Continental terminal in Newark. See Pl. Br. at 21-23. Specifically, plaintiff points out, *inter alia*, that she was made a terminal manager on the basis of her success in Washington D.C. and that she received a glowing evaluation while she was terminal manager. This does not satisfy plaintiff's burden, however, because at no time do defendants refer to plaintiff's performance while a general manager or a terminal manager as justification for their actions. The decision to eliminate plaintiff's last position and offer her a transfer allegedly stemmed, in part, from problems while she was a district manager, not a general or terminal manager. Thus, the fact that plaintiff purportedly performed well in prior positions does not demonstrate a weakness, inconsistency or incoherency in

defendants' evidence that their actions were based upon plaintiff's ineffectiveness while she was a district manager such that a reasonable trier of fact could find defendants' reasons to be simply a cover-up for a true discriminatory intent. See Fuentes, 32 F.3d at 765.

As for allegations regarding plaintiff's performance while a district manager, plaintiff states, but only in her brief, that the problems she experienced were with cities which were not originally within her district, namely Boston and Burlington, Vermont. See Pl. Br. at 23-24. That statement does not create a genuine issue of material fact. Whether or not the sites in the Northern region were part of plaintiff's original territory does not call into question defendants' evidence that plaintiff was not effective in the Northern region and would be better suited for the Mid-South region.

Neither is plaintiff's case advanced by some other bits and pieces which, at best, raise peripheral concerns. She has, for example, submitted a group of customer surveys, two of which rank her highly, namely one from Boston and one from Allentown, Pennsylvania. See Reimer Cert. dated Feb. 3, 1999, Exh. H. These positive customer surveys do not create a genuine issue of fact as to defendants' proffered reasons for their actions because defendants have not asserted that plaintiff received nothing but poor ratings. Indeed, if that were the case, it is doubtful in the extreme that defendants would have offered to transfer plaintiff to another district. Rather, defendants assert that they made a business judgment to transfer plaintiff because, among other reasons, she had experienced some problems with certain sites within her district. That assertion is not called into question by two positive reviews from other sites within the district.

Neither does it help even if, as plaintiff suggests, Richards misunderstood the history of the Eastern Division or that her responsibilities in the aviation industry prior to coming to ITS was not as limited as he believed. See Lemke Cert. ¶¶3, 4. Quite simply, neither of these irrelevant contentions, even if taken as true, raises an issue of fact as to whether defendants' reasons for their actions vis-a-vis plaintiff were merely fabrications to cover up intentional discrimination[13].

In sum, plaintiff has not met her burden of showing an issue of material fact as to whether defendants' reasons for their actions were merely pretextual. This, coupled with the fact that when ITS was reorganized,

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[13]Although not referenced anywhere in her brief, plaintiff has submitted the certification of Patricia Painter, a Human Resources Manager in the Eastern Division of ITS from September 5, 1995 to July 1, 1997. ~ Reimer Cert. dated March 3, 1999, Exh. C. None of the statements in Painter's certification establishes an issue of fact regarding pretext, and this court will give that certification the same short shrift it has been given by plaintiff.

although plaintiff was asked to transfer to the Mid-South region, another male district manager was demoted, convinces this court that there is no basis on which a reasonable factfinder could conclude that defendants' actions were fueled by discrimination. Defendants are, therefore, entitled to summary judgment as to plaintiff's Title VII and NJLAD claims[14].

B. Intentional Infliction of Emotional Distress Claims

Counts Three and Four of plaintiff's amended complaint set forth claims for the intentional infliction of emotional distress, albeit in slightly different terms.

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[14]In light of this disposition, this court need not reach defendants' argument that Richards cannot be held individually liable under Title VII or NJLAD. Parenthetically, however, in the Title VII context, it is abundantly clear that individual employees cannot be held liable under Title VII. See Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1077 (3d Cir. 1996), cert. denied, 521 U.S. 1129 (1997).In addition, this court need not address defendants' argument that plaintiff has failed to adequately mitigate damages.

Defendants move for summary judgment as to each of these counts and plaintiff has submitted no opposition.

It is clear to this court that summary judgment is warranted on the intentional infliction of emotional distress claims. To establish a claim for intentional infliction of emotional distress under New Jersey law, a plaintiff must show that: (1) defendants acted intentionally or recklessly; (2) the conduct was "extreme and outrageous;" (3) defendants' actions were the proximate cause of plaintiff's emotional distress; and (4) plaintiff suffered "severe emotional distress." McNemar v. The Disney Store, Inc., 91 F.3d 610, 622-23 (3d Cir. 1996) (applying New Jersey law), cert. denied, 519 U.S. 1115 (1997); see also Buckley v. Trenton Saving Fund Soc'y, 111 N.J. 355, 366 (1988).

Plaintiff's claims fail because she cannot establish that defendants' conduct was "extreme and outrageous." New Jersey courts

hold that to satisfy this element, a plaintiff must show that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Buckley, 111 N.J. at 366 (adopting standard set forth in Restatement (Second) of Torts § 46 (1965), comment d). Thus, plaintiff must allege conduct on the part of defendants such that "the recitation of facts to an average member of the community would arouse his [or her] resentment against the actor, and lead him [or her] to exclaim, 'Outrageous!'" Borecki v. Eastern Int'l Management Corp., 694 F. Supp. 47, 61 (D.N.J. 1988) (applying New Jersey law and quoting the Restatement (Second) of Torts § 46, comment d)

Plaintiff alleges only that defendants' discriminatory discharge of her constituted extreme and outrageous conduct. New Jersey

courts have repeatedly held that success on an intentional infliction of emotional distress claim arising from the workplace is "extremely rare." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988), cert. denied, 498 U.S. 811 (1990); see also King v. Port Authority of New York & New Jersey, 909 F. Supp. 938, 943 (D.N.J. 1995), aff'd, 106 F.3d 385 (3d Cir. 1996); McWilliams v. AT & T Info. Sys. Inc., 728 F. Supp. 1186, 1194 (W.D. Pa. 1990). Moreover, New Jersey courts do not perceive terminations of employment, in and of themselves, as evidence of the intentional infliction of emotional distress, but rather as a common occurrence in the workplace. See Cox 861 F.2d at 395 ("In the context of a dismissal . . . 'while loss of employment is unfortunate and unquestionably causes hardship, often severe, it is a common event' and cannot provide a basis for recovery for intentional infliction of emotional distress.") (citation omitted);

Borecki, 694 F. Supp. at 61 ("Generally, decisions to discharge an employee have not been found to constitute intentional infliction of emotional distress."). Even terminations based on discrimination, without accompanying harassment or something akin thereto, do not state a cause of action for the intentional infliction of emotional distress. See Borecki, 694 F. Supp. at 62 ("[C]ourts which have considered terminations of employment taken for discriminatory reasons, but unaccompanied by harassment, have found there could be no recovery for intentional infliction of emotional distress.") (citing cases); McNemar, 91 F.3d at 623 (under New Jersey law, "termination of employment does not, without evidence of harassment, support a claim of intentional infliction of emotional distress").

In short, the actions of the defendants do not manifest the degree of extreme and outrageous conduct required for a claim of

intentional infliction of emotional distress. Plaintiff has alleged absolutely no harassing conduct which could be said to elevate her discriminatory discharge claim to the realm of this strictly defined tort. Indeed, plaintiff admits that Richards and Weitzel always conducted themselves in a business-like manner curing their interactions with her. See Pl. Dep. at 158, 163–64, 172. At no time, she adds, did Richards ever physically threaten her, scream or yell at her, or even touch her aside from an occasional handshake. See id. at 172.[15] Because a claim for the intentional infliction of emotional distress is reserved for conduct that goes well beyond termination of employment, even for allegedly improper reasons, plaintiff's claims must

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[15] In contrast, a jury question as to the intentional infliction of emotional distress was presented where the plaintiff "received sexually offensive and threatening letters in her mail box at work, was the subject of crude and demeaning remarks and graffiti, as well as other humiliating treatment by her supervisors prior to her termination . . . •1! Borecki, 694 F. Su~c at 61 (discussing Porte v. Rollins Envtl. Services, 654 F. Sup~. 1275 (D.N.J. 19&7), afftd, 845 F.2d 1014 (3d Cir. 1988))

fail.

If more were needed, and assuredly it is not, "severe" emotional distress is required in order to sustain a claim for the intentional infliction of emotional distress. The requisite severity has been defined as "so severe that no reasonable man [or woman] could be expected to endure it." Buckley, 111 N.J. at 366 (citation omitted) . Quite simply, plaintiff admitted during her deposition that her emotional distress has never been severe, that she has never had any physical symptoms due to her emotional distress, and that she has never taken any medication to treat. See Pl. Dep. 462.

Accordingly, defendants are entitled to summary judgment on Counts Three and Four of the amended complaint.

C. Equal Pay Act Claim

Finally, plaintiff alleges in Count Five of her amended complaint that defendants violated the Federal Equal Pay Act("EPA"), 29

U.S.C. § 206(d), by paying her less than the male district managers at ITS. The EPA provides that:

> No employer... shall discriminate... between employees on the basis of sex by paying wages to employees...at a rate less than the rate at which he pays wages to employees of the opposite sex...for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are preformed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex

29 U.S.C. § 206(d) (1998); see also Brobst v. Columbus Services Int'l, 761 F.2d 148, 150-51 (3d Cir. 1985).

To establish a prima facie case under the EPA, plaintiff must show that:

> an employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

Dobowsky v. Stern, Lavinthal, Norgaard & Daly, 922 F. Supp. 985,990 (D.N.J. 1996)

(quoting Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974)); see also Brvd V. Ronavne, 61 F.3d 1026, 1033 (1st Cir. 1995) (stating that a prima facie case under the EPA is established when plaintiff shows that "the employer paid different wages to an employee of the opposite sex for substantially equal work") . Once a prima facie case has been established, the burden of persuasion shifts to the employer to establish one of the four affirmative defenses listed in the statute: namely, that the pay differential is due to either a seniority system, a merit system, a system which measures earnings by quality or quantity or production, or a reason other than sex. See Equal Employment Opportunity Comm'n V. State of Delaware Dep't of Health and Social Services, 865 F.2d 1408, 1414 (3d Cir. 1989); see also 29 U.S.C. § 206(d).

Defendants move for summary judgment on plaintiff's EPA claim contending that she has

failed to establish a prima facie case. Plaintiff, again, has submitted no opposition.

Defendants argue that, under Hein v. Oregon College Educ., 718 F.2d 910, 916 (9th Cir. 1983), plaintiff is required to show that her salary was lower than the average wages paid to employees of the opposite sex performing substantially equal work.[16] Because plaintiff identified her comparator pool to be the other Eastern Division district managers, i.e. Collins, Michel, Patric, Pudlak, and Watson, and the time periods for alleged unequal pay to be April 1996 and April/May 1997, defendants argue that plaintiff has failed to meet her burden as her salary was higher than the average salary of her five male counterparts both in

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[16]There is some case law which indicates that the plaintiff need only establish that she was paid less than a single similarly situated male employee to prove her EPA claim. See Dubowsky, 922 F. Supp. at 990; Mulbenix v. Forsyth Dental Infirmary for Children, 965 F. Supp. 120, 139 (D. Mass. 1996)Plaintiff, however, does not argue that the standard set forth in Hein should not be applied.

April 1996 and April/May 1997. Plaintiff does not dispute defendants' representation of the salaries of the Eastern Division district managers at issue here, nor does she argue that an average salary should not be utilized in the comparison. Plaintiff has, therefore, failed to establish a prima facie case of unequal pay under the EPA.

In addition, defendants argue that, even if only the two male district managers whose wages were higher than plaintiff during the specified time periods (Pudlak and Collins) are used as comparators, plaintiff has failed to present evidence establishing that Pudlak and Collins were working in substantially equal jobs. In order to set forth a prima facie case under the EPA, plaintiff must show that she was paid less than male employees at ITS in positions requiring equal skill, effort and responsibility and with similar working conditions.

See Mullinex, 965 F. Supp. at 139; see also 29 U.S.C. § 206(d). Although all of the persons at issue here were titled "district managers," it is clear that the inquiry centers around actual job content as opposed to job titles or descriptions. See Brobst, 761 F.2d at 155; see also Mullinex, 965 F. Supp. at 139. It is plaintiff's burden both to establish a prima facie case and to come forward with evidence in opposition to defendants' motion for summary judgment. She has come forward with nothing comparing her position at ITS to the positions held by Pudlak and Collins, rendering her prima facie case deficient. . See Creech v. Ohio Cas. Ins. Co., 944 F. Supp. 1347, 1353 (S.D. Ohio 1996) (holding that the court could not assume that the same job title means equal work for purposes of the EPA).

Accordingly, defendants' motion for summary judgment on Count Five will be granted.

## III. CONCLUSION

For the above stated reasons, defendants' motion for summary judgment is granted. Conversely, plaintiff's cross-motion for summary judgment is denied. An appropriate order will issue.

MARYANNE TRUMP BARRY

Dated: July 15, 1999